

APPEAL NO. 040394
FILED APRIL 2, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 27, 2004. The hearing officer resolved the disputed issues by deciding that the appellant (carrier herein) waived the right to contest that the respondent (claimant herein) injured her low back, and that on _____, the claimant sustained a low back injury in addition to an injury to her left knee. The carrier appeals, arguing that carrier waiver does not apply to extent of injury, and by accepting an injury to the claimant's left knee, it did not waive an injury to the claimant's low back. The carrier also argues that the claimant's low back problems predate her compensable injury. The claimant responds that the carrier could have timely disputed the low back injury if it had investigated the claim, and that the evidence supports the hearing officer's conclusion that the claimant suffered a compensable injury to her low back.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that she worked as a psychiatric technician and that on _____, she was injured when she was helping take a patient to the drive to be picked up. The claimant testified that she was pushing the patient's luggage up a ramp in a wheelchair when she felt her knee pop and felt pain in her back. The claimant filled out an incident report for her employer in which she stated that she injured her low back and left knee. It is undisputed that the carrier received notice of the injury from the employer on November 14, 2000. However, the carrier argues that it only received notice of a left knee injury, and not a back injury. The carrier argues that it accepted the left knee injury, but did not accept a back injury. On July 1, 2002, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), disputing that the claimant's low back injury was part of the claimant's compensable injury.

The hearing officer's decision includes the following Findings of Fact:

10. Carrier could have discovered through active investigation after it received written notice of injury on November 14, 2000 the Claimant's written notice of injury to her employer claiming a back injury, and the medical records of Claimant's treating physician indicating complaints of a back injury by Claimant and treatment of same by the physician, such that a timely dispute of Claimant's back injury claim could have been filed.
11. Claimant sustained an injury to her low back on _____ in the form of incitement, acceleration and aggravation of a pre-

existing low back condition, in addition to the injury to her left knee in the course and scope of her employment.

The carrier contends that these factual findings are not supported by the evidence. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer was persuaded that the claimant sustained her burden of proving the above challenged factual determinations. Nothing in our review of the record reveals that the hearing officer's determinations in that regard are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb these factual determinations on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

While there is evidence that the claimant had back problems prior to the injury at work, such prior back problems certainly did not preclude the claimant from suffering a compensable injury through aggravation of the preexisting condition. Thus, we find no error in the hearing officer's conclusion that the claimant sustained a compensable low back injury. Hardware Mutual Casualty Co. v. Wesbrooks, 511 S.W.2d 406 (Tex. Civ. App.-Amarillo 1974, no writ); Guzman v. Maryland Casualty Co., 107 S.W.2d 356, (Tex. 1937).

Nor do we find any merit to the carrier's argument that it did not waive its right to dispute the compensability of the claimant's low back injury, asserting that this presented an extent-of-injury issue, not a waiver issue. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to "extent of injury" disputes. Notwithstanding, we have said that that rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby avoid the mandates of Section 409.021. See Texas Workers' Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers' Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002. It is clear from this case that the primary claimed injury included the low back as well as the left knee. As such, the carrier was obligated to dispute the compensability of the low back in accordance with Section 409.021. The carrier failed to do this. Since the carrier waived the right to contest compensability of the low back injury, it became compensable as a matter of law

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge